STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED March 25, 2010
v	No. 285662 Manistee Circuit Court
ANDREW BRIAN MORRISON, Defendant-Appellant.	LC No. 07-003778 FC

Before: Meter, P.J., and Murphy, C.J., and Zahra, J.

PER CURIAM.

Defendant pleaded guilty to carjacking, MCL 750.529a. Thereafter, defendant unsuccessfully attempted to withdraw his plea and was subsequently sentenced to a term of 20 to 42 years in prison. Defendant appeals by leave granted. We affirm.

Defendant first argues that the trial court abused its discretion in denying his motion to withdraw the plea. We review for an abuse of discretion a trial court's decision to deny a defendant's motion to withdraw a plea. *People v Wilhite*, 240 Mich App 587, 594; 618 NW2d 386 (2000). We consider whether the court's decision fell within the range of reasonable and principled outcomes. *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006).

At a pretrial hearing, the prosecutor informed the court that he would agree to dismiss the habitual offender supplement that had been filed if defendant pleaded guilty to carjacking. Defendant stated that he would plead. Defense counsel then noted that the habitual offender notice had, contrary to statute, been filed more than 21 days after defendant's arraignment and indicated that he did not want defendant involved in an illusory plea. The trial court granted defendant's request for more time to research the matter before accepting the plea. Six weeks later, the plea was again brought before the trial court. The plea was described as defendant's agreeing to plead guilty to carjacking in exchange for the prosecutor's promise to not pursue an habitual offender enhancement and to not oppose imposition of a sentence within the guidelines. Defendant accepted the plea and indicated on the record that he understood its conditions and that the possible maximum sentence was life.

At defendant's first sentencing hearing, defendant's counsel indicated that defendant had done some independent research and felt that he was led into an illusory plea and, as a result, wished to withdraw it. The trial court refused to grant the oral motion, but stated that it would allow time for a written motion to be filed. A pro se motion was subsequently filed, followed by

a motion filed on defendant's behalf by defense counsel. The first motion did not raise the issue of an illusory plea,[1] but the second did. The trial court denied defendant's motions, concluding, in part, that defendant had accepted the plea agreement with full knowledge that the habitual offender notice had been filed late.

While a plea may be withdrawn after acceptance but before sentencing if it is in the interest of justice, MCR 6.310(B)(1), "[t]here is no absolute right to withdraw a guilty plea once it has been accepted," *People v Gomer*, 206 Mich App 55, 56; 520 NW2d 360 (1994). However, a defendant may be entitled to withdraw a guilty plea if the agreement the plea was based on was illusory, i.e., if it provided no benefit to the defendant. *People v Harris*, 224 Mich App 130, 132; 568 NW2d 149 (1997).

In the instant case, it is clear that defendant was aware that the habitual offender notice had not been timely filed. Indeed, defendant requested additional time to research the issue before accepting the plea, and the trial court granted this additional time. Despite being aware of the late notice, defendant nevertheless accepted the plea six weeks later and acknowledged the rights that would be given up by pleading. Because defendant was aware of the questionable benefit of the plea agreement regarding the promise not to seek sentence enhancement under the habitual offender statute, defendant cannot now claim on appeal that the agreement was illusory. *People v Williams*, 153 Mich App 346, 351; 395 NW2d 316 (1986) ("[a]s long as the defendant knows in advance that the plea bargain has no value or knows that the value is questionable or minimal, the plea bargain is not illusory").[2]

Defendant next argues that the trial court improperly calculated his sentencing guidelines score. We disagree.

> This Court reviews a sentencing court's scoring decision to determine whether the trial court properly exercised its discretion and whether the record evidence adequately supports a particular score. . . . However, [a scoring] issue also entails a question of statutory interpretation, which is reviewed de novo. [*People v*

[1] Defendant's pro se motion focused on issues related to sentencing, which the prosectuor indicated did not support withdrawing the plea and were better addressed during sentencing.

[2] We also note that the plea was supported by an additional promise – the prosecutor's promise to not oppose a sentence within the calculated minimum guidelines range. Also, we reject defendant's argument that he is entitled to raise the issue of the validity of the promise not to seek habitual offender sentence enhancement because the codification of the time requirements for filing a habitual offender notice renders them jurisdictional. Following a guilty plea, a defendant may only raise jurisdictional issues that "implicate[] the very authority of the state to bring the defendant to trial." *People v Lannom*, 441 Mich 490, 493; 490 NW2d 396 (1992) (internal citations and quotation marks omitted). However, there is nothing in the language of MCL 769.13, dealing with habitual offender enhancement notice requirements, that would preclude the state from bringing the carjacking charge against defendant even if the habitual offender notice had been filed late.

Wilson, 265 Mich App 386, 397; 695 NW2d 351 (2005) (internal citation and quotation marks omitted).]

Defendant specifically challenges the assessment of 25 points for offense variable (OV) 9 (multiple victims), 10 points for OV 17 (degree of negligence exhibited), 10 points for OV 18 (degree to which alcohol or drugs affected the offender), and 10 points for OV 19 (interference with administration of justice). Defendant contends that his actions in attempting to flee from police should not be scored in connection with the instant carjacking case because they related to a separate fleeing and eluding offense prosecuted in another county.

Defendant cites *People v McGraw*, 484 Mich 120; 771 NW2d 655 (2009) as supporting his position. *McGraw* held that "a defendant's conduct after an offense is completed does not relate back to the sentencing offense for purposes of scoring offense variables unless a variable specifically instructs otherwise." *Id*. at 122. The Court stated, "[t]herefore, in this case, defendant's flight from the police after breaking and entering a building was not a permissible basis for scoring OV 9. *Id*. The defendant in *McGraw* had pleaded guilty to "three counts of breaking and entering a building with intent to commit larceny." *Id*. The breaking and entering statute clearly indicates that the offense has been completed once "[a] person . . . breaks and enters, with intent to commit a felony or a larceny therein," a building or structure. MCL 750.110(1). The *McGraw* Court stated, [w]hen we consider only the breaking and entering, it is apparent that no one was placed in danger of injury or loss of life. No one was present in the general store or anywhere near the defendant when he broke into the building." *McGraw, supra* at 134. The Court went on to state:

> There is no need for us to determine precisely when the breaking and entering offense was completed for purposes of scoring the sentencing guidelines in this case; it is clear that defendant's flight from the police and the subsequent events involved here were far beyond and removed from the sentencing offense. [*Id*. at 135 n 45.]

In the case at hand, the offense was ongoing throughout the time defendant acted to retain possession of the vehicle. MCL 750.529a states:

> (1) A person who in the course of committing a larceny of a motor vehicle uses force or violence or the threat of force or violence, or who puts in fear any operator, passenger, or person in lawful possession of the motor vehicle, or any person lawfully attempting to recover the motor vehicle, is guilty of carjacking, a felony punishable by imprisonment for life or for any term of years.
>
> (2) As used in this section, "in the course of committing a larceny of a motor vehicle" includes acts that occur in an attempt to commit the larceny, or during commission of the larceny, or in flight or attempted flight after the commission of the larceny, or in an attempt to retain possession of the motor vehicle.

Therefore, the conduct on which the trial court based its scoring decisions for OVs 9, 17, 18, and 19 does not run afoul of our Supreme Court's holding in *McGraw*. See MCL 750.529a. Indeed, we find that *McGraw's* reasoning necessarily implies its reciprocal, i.e., that a defendant's

conduct before an offense is completed *does* relate back to the sentencing offense for purposes of scoring offense variables.

MCL 777.21(2) requires a defendant to be scored for each offense when convicted of multiple offenses. Under MCL 777.39, dealing with OV 9 (number of victims), the people to be considered are those who were placed in danger of injury or loss of life when the sentencing offense or criminal transaction was committed. *People v Sargent*, 481 Mich 346, 350; 750 NW2d 161 (2008). OV 17 requires 10 points to be assessed when a defendant exhibited "wanton or reckless disregard for the life or property of another person." MCL 777.47(1)(a). OV 19 requires 10 points to be assessed when an offender "interfered with or attempted to interfere with the administration of justice." MCL 777.49(c). In the instant case, defendant did not give up possession of the vehicle until after he had led multiple officers on a chase. Defendant was observed driving through an intersection on a red light, driving erratically in an attempt to avoid police officers, and driving on the sidewalk near a pedestrian and her children. This evidence was sufficient to uphold the scoring decisions for OVs 9, 17, and 19. "Scoring decisions for which there is any evidence in support will be upheld." *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002) (internal citation and quotation marks omitted).

OV 18 requires 10 points to be assessed when an offender operated a vehicle with any amount in his body of

> a controlled substance listed in schedule 1 under section 7212 of the public health code, 1978 PA 368, MCL 333.7212, or a rule promulgated under that section, or a controlled substance described in section 7214(a)(*iv*) of the public health code, 1978 PA 368, MCL 333.7214 . . . . [MCL 777.48(1)(c).]

Defendant's own testimony at the plea hearing indicated that he "was on drugs" at the time he took the victim's vehicle. Moreover, the sentencing report indicates that defendant's description of the offense included an admission that he had smoked crack ten minutes before forcibly taking the victim's car. This was sufficient evidence to uphold the scoring decision. *Hornsby*, *supra* at 468.

We also reject defendant's argument that he was denied effective assistance of counsel. In order to prevail on a claim of ineffective assistance of counsel, defendant must show that: (1) counsel's performance fell below an objective standard of reasonableness under prevailing professional norms; (2) there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different; and (3) the resultant proceedings were fundamentally unfair or unreliable. *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001).

Defendant specifically claims that his attorney argued in favor of a harsh sentence to be imposed at the sentencing hearing. Following the prosecutor's remarks at sentencing, defendant's counsel made the following statement:

> No one can argue that the facts aren't serious. I mean, the situation could have been far worse. I think the defendant is an example of the – not that he's a victim, I'm not saying that – he represents a person who got caught up at a young age in drugs, and cocaine in particular, from what I know of him. I think . . . he's an

example of why society should take a very, very hard stance regarding the use of illegal drugs, and those who purvey it to our community.

When viewed in context, these remarks did not constitute a request that a harsh sentence be imposed, as defendant asserts. Rather, it appears that defense counsel was requesting leniency because of defendant's history with drugs, implying that his drug abuse led to the carjacking. Moreover, before making this statement, defendant's counsel had argued strongly against the scoring of several of the OVs, and if he had been successful he would have significantly reduced defendant's recommended minimum range (and, again, the prosecutor had promised not to seek a minimum outside the recommended range). Additionally, the trial court did not specifically refer to defense counsel's remarks when it imposed defendant's sentence. Rather, the court focused on the circumstances of the crime itself, specifically noting a "terrorizing situation for the victim" and "a wanton endangerment of many people" as defendant was fleeing from police. If any reference was made to defense counsel's remarks, it was to defendant's benefit. Specifically, the court noted the need to balance the seriousness of this crime against the fact that "as bad as this was, it could have been much worse."

Defendant has not shown that his counsel's performance was deficient; nor has he shown that there is a reasonable probability that, but for counsel's alleged error, the result of the proceedings would have been different. *Id*.

As a final matter, defendant argues that that his Sixth Amendment[3] right to a jury trial was violated because the trial court engaged in impermissible fact finding in order to determine his minimum sentence. However, as defendant recognizes, our Supreme Court has clearly and consistently held that *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004) does not apply to Michigan's indeterminate sentencing scheme. See, e.g., *People v McCuller*, 479 Mich 672, 683-691; 739NW2d 563 (2007). Accordingly, this argument is without merit.

Affirmed.

/s/ Patrick M. Meter
/s/ William B. Murphy
/s/ Brian K. Zahra

[3] US Const, Am VI.